

2011

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Recommended Citation

Bennett L. Gershman, Prosecutorial Decisionmaking and Discretion in the Charging Function, 62 Hastings L.J. 1259 (2011), <http://digitalcommons.pace.edu/lawfaculty/797/>.

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Prosecutorial Decisionmaking and Discretion in the Charging Function

BENNETT L. GERSHMAN*

A prosecutor's charging decision is the heart of the prosecution function. The charging decision involves an extraordinary exercise of discretionary power that is unreviewable. As a result, the decision is difficult to guide except in the broadest terms. The proposed revisions to the ABA's Criminal Justice Standards for the Prosecution Function attempt to address several key issues that inform the charging decision, by broadening the language of several provisions of the current Standards as well as adding several new provisions. To be sure, the proposed Standards significantly change the current Standards with respect to the proper factors and considerations affecting a prosecutor's charging decision. Nonetheless, it is unclear whether these Standards purport to establish ethical guidelines for prosecution, or merely guidelines for a prosecutor's exercise of judgment and policy in the charging function. This Article assesses the extent to which the proposed Standards cover several charging issues effectively, inadequately, or at all. Specifically, this Article focuses on (1) the retention and modification of the probable cause standard for filing charges; (2) the differing Standards for filing and maintaining charges; (3) the role of innocence in the charging decision; (4) discretionary factors in the charging decision; (5) improper considerations in the charging decision; (6) the role of race and community pressure; (7) the issue of filing multiple charges—so-called “overcharging”—and (8) the Standard for actions premised on a defendant's agreement not to sue.

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INTRODUCTION

A prosecutor's charging decision is the heart of the prosecution function. Three features of the charging decision stand out. First, the prosecutor's charging decision involves an enormous exercise of power—described by Justice Robert H. Jackson as “the most dangerous power of the prosecutor.”¹ Second, that power is virtually unreviewable.² Third, the charging decision is an exercise of discretion that involves so many factors and considerations that it cannot be reduced to a simple formula. It is therefore difficult to design professional standards to guide a prosecutor's charging function except in the broadest terms.

1. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

2. See *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.) (“Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . .”).

The current ABA Criminal Justice Standard 3-3.9, described below, attempts to address several key issues that inform the charging decision.³ The proposed revisions to the Standards by the Task Force,⁴ also described below, change this approach by dividing the charging function into two separate standards: Standard 3-5.5 and Standard 3-5.6.⁵ The proposed Standards amplify the current Standard by broadening the language in several of the provisions and adding several new provisions. Thus, proposed Standard 3-5.5 focuses on the appropriate standard a prosecutor should apply in deciding whether to file and maintain criminal charges.⁶ Proposed Standard 3-5.6 focuses on several of the discretionary factors that a prosecutor should consider in making that decision, as well as some of the recurring issues that influence the exercise of discretion.⁷

It is unclear whether these charging Standards purport to establish ethical guidelines for prosecution, or merely guidelines for a prosecutor's exercise of judgment and policy in the charging function. If the Task Force intended to establish ethical rules for the charging function, it probably should have cross-referenced the charging Standards with

3. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 (3d ed. 1993).

4. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION (Proposed Revisions 2009). The Task Force, composed of prosecutors, defense attorneys, judges, and academics, recently completed a draft of revised sets of Standards for consideration by the ABA Criminal Justice Section Standards Committee. After completing its work, the Standards Committee will present its proposed revisions to the Criminal Justice Section Council for consideration, debate, revisions, and approval. *See generally* Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111 (2011) (describing the process); Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10 (same).

5. *Id.* §§ 3-5.5, 3-5.6. The Task Force's rationale in separating the current Standard into two separate proposed Standards is unstated. Perhaps the Task Force believed that the separation would promote clarity and consistency. To be sure, proposed Standard 3-3.5 focuses mostly on the prosecutor's mental state in filing and maintaining charges, whereas proposed Standard 3-3.6 identifies several discretionary factors in charging. *Id.* However, although the two proposed Standards broaden the language in the current Standard in several respects, there are several provisions in the proposed Standards that appear to overlap with each other and may even reduce the level of simplicity and clarity in the current Standard.

6. *Id.* § 3-5.5. Although this Standard refers to the "methods by which a prosecutor may pursue criminal charges, including complaints, informations, and grand jury indictments," the substance of the Standard focuses not on a prosecutor's "methods" of charging but, rather, on the prosecutor's belief in the factual basis for the charges, his belief in the defendant's guilt or innocence, and the avoidance of improper considerations in charging. *Id.*; *see also* discussion *infra* Part II.C–G.

7. *Id.* § 3-5.6. The Task Force also revised and renumbered current Standards 3-3.4, 3-3.5, 3-3.6, and 3-3.8, which deal with the prosecutor's relations with investigators, complainants, and the grand jury, and a prosecutor's consideration of noncriminal dispositions. *Compare id.* §§ 3-5.1, 3-5.2, 3-5.3, 3-5.4 (providing the Task Force proposed revisions), *with* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §§ 3-3.4, 3-3.5, 3-3.6, 3-3.8 (3d ed. 1993) (providing the current, unrevised Standards). As noted below, current Standard 3-3.7, dealing with the "quality and scope of evidence for information," has been renumbered as proposed Standard 3-5.5(a). *See* discussion *infra* Part II.B. Given the limited space and time constraints, I have decided to focus exclusively on the revisions to the principal charging standard: current Standard 3-3.9.

proposed Standard 3-1.3, entitled “Improper Bias Prohibited.”⁸ This Standard provides in subdivision (a), “A prosecutor should not invidiously discriminate against, or in favor of, any person on the basis of constitutionally or statutorily impermissible criteria,” and “should not use other improper considerations (such as partisan or other improper political or personal factors) in exercising prosecutorial discretion.”⁹ With the exception of establishing the appropriate evidentiary standard for charging, it would appear that as an ethical proscription, proposed Standard 3-1.3 would adequately cover a prosecutor’s charging conduct. It might, therefore, seem unnecessary and superfluous to include in the “charging Standards” a list of factors and considerations that rely on a prosecutor’s policy, expertise, and judgment.

To be sure, the Task Force has made significant changes to the current Standards with respect to the proper factors and considerations that affect a prosecutor’s charging conduct. My comments are intended to assess the extent to which the Task Force has addressed several charging issues effectively, inadequately, or at all. My comments focus specifically on (1) the retention and modification of the probable cause standard for filing charges; (2) the differing standards for filing and maintaining charges; (3) the role of innocence in the charging decision; (4) discretionary factors in the charging decision; (5) improper considerations in the charging decision; (6) the role of race and community pressure; (7) the issue of filing multiple charges—so-called “overcharging”—and (8) the Standard for actions premised on a defendant’s agreement not to sue.¹⁰

I. ABA PROSECUTION FUNCTION STANDARDS

Current Standard 3-3.9, entitled “Discretion in the Charging Decision,” is modified by two of the new proposed Standards, Standards 3-5.5 and 3-5.6 respectively. This Part describes the provisions set forth in each of these Standards.

8. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.3 (Proposed Revisions 2009).

9. *Id.*

10. There is no Standard that addresses a prosecutor’s decision to charge capital murder. The only reference to the death penalty in the proposed Standards appears in Standard 3-6.6, relating to the preservation of evidence in death penalty cases. *Id.* § 3-6.6. Unquestionably, a prosecutor plays a central role in deciding whether to invoke capital punishment, and a large majority of states and the federal government authorize capital punishment. Charging capital murder presents many discretionary considerations for a prosecutor, involving specific aggravating and mitigating factors not usually considered in charging noncapital crimes. Even though the ABA apparently takes no position on the death penalty, it is surprising that the Prosecution Function Standards do not address the range of issues relating to a prosecutor’s charging conduct in death penalty cases.

A. CURRENT STANDARD 3-3.9: DISCRETION IN THE CHARGING DECISION

Current Standard 3-3.9 conditions and circumscribes the prosecutor's decision to institute charges against individuals. In particular, a prosecutor is advised not to bring or maintain criminal charges when she "knows that the charges are not supported by probable cause."¹¹ Likewise, where she "has a reasonable doubt about the guilt of the accused," her supervisor ought not to compel her to bring or maintain charges.¹² The prosecutor also ought to have "sufficient admissible evidence to support a conviction" when bringing or maintaining those charges.¹³ In fact, she "should not bring or seek charges greater . . . than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense."¹⁴

On the other hand, when deciding to bring charges, a prosecutor may decide not to prosecute certain charges, even in the presence of "sufficient evidence . . . [to] support a conviction," where "circumstances and . . . good cause consistent with the public interest" warrant such a decision.¹⁵ The Standard lists a number of "illustrative" factors that the prosecutor may consider deciding whether to bring or maintain charges, including (1) reasonable doubt as to the accused's actual guilt; (2) "the extent of the harm caused by the offense;" (3) the proportionality of the potential punishment "to the particular offense or the offender;" (4) the motives of the accuser; (5) the victim's willingness to testify; (6) the degree to which the accused assists in prosecuting others; and (7) the "availability and likelihood of prosecution by another jurisdiction."¹⁶ In addition to these factors, a prosecutor should not consider the personal or political costs and benefits that might derive from the decision to bring or maintain criminal charges.¹⁷ Moreover, where there is "a serious threat to the community," she must not decline to press charges on the ground that juries in the community tend "to acquit persons accused of the particular kind of criminal act in question"¹⁸

Finally, the Standard addresses the decision to dismiss any charges, entry of *nolle prosequi*, or "similar action": ending the case should not be "condition[ed] . . . on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and

11. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed.1993).

12. *Id.* § 3-3.9(c).

13. *Id.* § 3-3.9(a).

14. *Id.* § 3-3.9(f).

15. *Id.* § 3-3.9(b).

16. *Id.* § 3-3.9(b)(i)-(vii).

17. *Id.* § 3-3.9(d).

18. *Id.* § 3-3.9(e).

intelligently, freely and voluntarily, and where such waiver is approved by the court.”¹⁹

B. PROPOSED STANDARD 3-5.5: THE DECISION TO FILE AND MAINTAIN CRIMINAL CHARGES

By contrast, the proposed Standards divide the aspects of a prosecutor’s job into two different sections. The first, in proposed Standard 3-5.5, is “The Decision to File and Maintain Criminal Charges.”²⁰ That Standard conditions the initial filing of charges on whether “the prosecutor believes the charges are supported by probable cause and reasonably believes that there will be admissible evidence to support the charges beyond reasonable doubt by the time of disposition.”²¹ As in the current Standard, the prosecutor should not consider the potential personal or political costs and benefits in deciding whether to file and maintain charges. Additionally, with particular respect to the decision to charge “[r]ace or other unlawful factors should never be considered”²² However, irrespective of the weight of the evidence in the case, “if the prosecutor believes the defendant is innocent,” she should neither file nor maintain charges.²³

Once the prosecutor files charges, those charges “should [be] maintain[ed] only if the prosecutor reasonably believes that probable cause continues to exist” and that there will be enough “admissible evidence to support the charges beyond reasonable doubt by the time of disposition.”²⁴ Dismissal of charges is therefore warranted when a “prosecutor reasonably believes there is no probable cause to support them.”²⁵ Finally, “[a] prosecutor should not take criminal charges to final judgment if the prosecutor reasonably believes that proof of guilt beyond reasonable doubt is lacking.”²⁶

C. PROPOSED STANDARD 3-5.6: DISCRETION IN FILING AND MAINTAINING CRIMINAL CHARGES

The second aspect, in Standard 3-5.6, focuses on the exercise of discretion in prosecuting a case. Entitled “Discretion in Filing and Maintaining Criminal Charges,” the Standard clarifies that a prosecutor may exercise their discretion in deciding whether and what charges to bring and maintain in light of the available evidence. In particular, the

19. *Id.* § 3-3.9(g).

20. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5 (Proposed Revisions 2009).

21. *Id.* § 3-5.5(a).

22. *Id.* § 3-5.5(d).

23. *Id.* § 3-5.5(c).

24. *Id.* § 3-5.5(b).

25. *Id.* § 3-5.5(c).

26. *Id.*

prosecutor need not “file or maintain all criminal charges which the evidence might support.”²⁷ Indeed, she may decline to prosecute a case, despite the state of the evidence, where circumstances and “good cause consistent with the public interest” may warrant.²⁸ Factors that a prosecutor “may properly consider” when deciding to “decline or dismiss charges” include the following: (1) any reasonable doubt as to the accused’s actual guilt; (2) “the extent of the harm caused by the offense;” (3) the proportionality of the potential punishment “to the particular offense or the offender;” (4) the motives of the accuser; (5) the victim’s willingness to testify; (6) any “improper conduct by law enforcement actors in the matter;” (7) the degree to which prosecuting the case would undermine “the policy that similarly situated persons be treated equally;” (8) the “potential collateral impact[] on third-parties, including witnesses or victims;” (9) the degree to which the accused assists in prosecuting others; (10) the particulars of the offender’s character, or his situation; (11) “changes in the evidence, legal rules, disposition of similar cases, or in the larger cultural context, including that the statute has fallen into desuetude;” (12) the effect on the public welfare of the decision either to prosecute or to decline to prosecute; (13) “the fair and efficient distribution of limited prosecutorial resources;” and (14) “the availability and likelihood of prosecution by another jurisdiction.”²⁹ Another important consideration is the Standard’s directive that “[t]he prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and that are necessary to fairly reflect the gravity of the offense or deter similar conduct.”³⁰ However, if the evidence does support the charges, “[a] prosecutor may file and maintain charges even if juries in the jurisdiction” typically “acquit persons accused of the particular kind of criminal act in question.”³¹

The Standard further advises prosecutors to express any doubts about the evidence in their cases to their supervisors. If an “individual prosecutor has a reasonable doubt about the guilt of the accused,” her supervisor should not compel her to prosecute the case.³² But, the office may still bring or maintain criminal charges “where there is reasonable disagreement” about the evidence in the case and where the office complies “with other applicable standards.”³³

27. *Id.* § 3-5.6(a).

28. *Id.*

29. *Id.* § 3-5.6(a)(i)–(xiv).

30. *Id.* § 3-5.6(d).

31. *Id.* § 3-5.6(c).

32. *Id.* § 3-5.6(b).

33. *Id.*

Finally, with respect to dismissal, *nolle prosequi*, and other actions ending a criminal case, “[a] prosecutor may condition” such an action “on the accused’s relinquishment of a right to seek civil redress, only if the accused has agreed to the action knowingly, intelligently and voluntarily, and such waiver is disclosed to the court.”³⁴ But, the “decision not to file criminal charges should be made on its merits and not for the purpose of obtaining a civil waiver.”³⁵ Such a waiver should not be used “to avoid a bona fide claim of improper law enforcement.”³⁶

II. SOME COMMENTS ON THE PROPOSED STANDARDS

The provisions in the proposed Standards are markedly different from the ones set forth in the current Standard. The remainder of this Article parses through these differences, which, if adopted, could significantly impact the exercise of prosecutorial discretion.

A. RETENTION AND MODIFICATION OF THE PROBABLE CAUSE STANDARD

Proposed Standard 3-5.5 retains the “probable cause” standard for instituting criminal charges³⁷ but describes the prosecutor’s mental state differently than does the current Standard 3-3.9(a).³⁸ Under the proposed Standard, “A prosecutor should file criminal charges only if the prosecutor *believes* the charges are supported by probable cause.”³⁹ Under the current Standard, “A prosecutor should not institute . . . criminal charges when the prosecutor *knows* that the charges are not supported by probable cause.”⁴⁰ Two points are noteworthy. First, the proposed Standard uses different language to describe the prosecutor’s mental state—namely, “believes” instead of “knows.”⁴¹ Interestingly, both the current Standard and the proposed Standard focus exclusively on the prosecutor’s subjective state of mind; neither Standard requires that the prosecutor’s belief be objectively reasonable.⁴² To be

34. *Id.* § 3-5.6(e).

35. *Id.*

36. *Id.*

37. *Id.* § 3-5.5.

38. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed. 1993). As noted, the prefatory language in proposed Standard 3-5.5 states that the Standard addresses “the methods by which a prosecutor may pursue criminal charges, including complaints, informations, and grand jury indictments.” STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5 (Proposed Revisions 2009). However, as also noted, the text of the current Standard appears to say nothing about these “methods” of charging, focusing instead on the prosecutor’s mental state in filing and maintaining charges. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed. 1993).

39. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5 (Proposed Revisions 2009) (emphasis added).

40. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed. 1993) (emphasis added).

41. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5 (Proposed Revisions 2009).

42. It is noteworthy that the Standards do not define the terms used to describe the prosecutor’s

sure, as an evidentiary standard, it does seem much more appropriate to refer to what a prosecutor “believes” rather than what a prosecutor “knows.” Indeed, we typically refer to a police officer’s belief in probable cause, rather than to his “knowing” of the existence of probable cause. And under the familiar definition of probable cause—“reasonable ground for belief of guilt”⁴³—one would therefore understand this Standard to require a prosecutor “to believe that there are reasonable grounds to believe,” which is a peculiar mindset but is, nonetheless, the basis required by this Standard.

Second, both the current Standard and the proposed Standard require a prosecutor to have a subjective belief that there exists at least some quantum of proof in terms of the scope and quality of evidence amounting to “probable cause” before filing charges—in other words, that it is more likely than not that a crime was committed and that the defendant committed it. As the commentary to the current Standard acknowledges, a probable cause standard is an extremely low threshold for bringing charges.⁴⁴ Indeed, unless there is some basis for believing that a prosecutor filed charges in bad faith for the purpose of harassment, retaliation, or discrimination, it would seem to be virtually impossible to demonstrate that, when she brought charges, a prosecutor lacked a subjective belief that they were supported by probable cause. As either an ethical or a practice-oriented rule, this Standard seems to require so little of a prosecutor that short of venality, it would appear to allow reckless and incompetent charging without any risk of professional oversight.⁴⁵

This is not to say that applying a probable cause standard in practice does not raise useful questions which both the current and the proposed Standards fail to address specifically. For example, there is no indication that either the current or proposed Standards require a prosecutor to conduct any investigation or to consider the quality and quantity of evidence before determining that probable cause exists. As a matter of professional ethics, should not a prosecutor investigate the credibility of the complainant and witnesses before bringing charges? Should not a

mental state, including terms such as “knows,” “believes,” and “reasonably believes.” Presumably, the Standards rely on Rule 1.0 of the Model Rules of Professional Conduct, entitled “Terminology,” for definitions of these terms. *See* MODEL RULES OF PROF’L CONDUCT R. 1.0 (2010).

43. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

44. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 cmt. (3d ed. 1993) (“[P]robable cause standard, which is substantially less than sufficient admissible evidence to sustain a conviction, is sufficiently minimal that a prosecutor should not err in deciding whether the quantum of evidence is adequate to institute criminal proceedings.”).

45. Notably, the Model Rules also use the probable cause standard for criminal charges. *See* MODEL RULES OF PROF’L CONDUCT R. 3.8 (2010) (“Special Responsibility of a Prosecutor”). However, the Model Rules treat a prosecutor’s conduct in a much more limited fashion than do the far more specific and comprehensive ABA Criminal Justice Standards.

prosecutor consider contradictory evidence that negates guilt? Consider the following case:

A complainant alleges she was sexually attacked by three students after she was hired to engage in an exotic dance performance at a college party. She identifies from a police photo lineup the three individuals who allegedly attacked her. Medical procedures detect vaginal swelling, and a professional opines that her behavior is consistent with that of a victim of a sex crime.⁴⁶

Under the current Standard, a prosecutor could believe that there is probable cause that a rape occurred and that the three persons identified by the complainant committed this crime. However, should a prosecutor, as a matter of professional ethics and sound prosecutorial practice, be required to conduct an investigation to determine the accuracy of the allegation? Moreover, should a prosecutor be required to consider contradictory evidence in evaluating whether probable cause exists? For example, assume that the prosecutor in the above case receives reliable evidence that the complainant was intoxicated during the party, that she initially misidentified one of the perpetrators as not being involved, that she initially recanted her claim that she had been raped, that she had a history of mental illness, that no DNA from the rape kit matched any of the three alleged perpetrators but did match several other males, and that a friend of the complainant who was with her at the party described her rape allegation as a fabrication.

As an ethical matter, as well as a matter of policy and judgment, the proposed Standard authorizes a prosecutor to file criminal charges “only if the prosecutor believes the charges are supported by probable cause.”⁴⁷ Are they? The complainant has identified three perpetrators as having raped her, and there is some corroboration. Should a prosecutor, in forming a belief in the existence of probable cause, consider the substantial evidence that appears to contradict guilt? The proposed Standard does not answer this question. It would seem that if the Standard requires that the prosecutor’s belief be reasonable, then a prosecutor would likely have to consider this contradictory evidence. Obviously many prosecutors, as a matter of policy and judgment, probably would consider evidence negating probable cause before bringing charges. However, a Standard that presumes to serve as a guideline for professionally proper prosecutorial conduct should

46. I have used as the basis for this hypothetical the highly publicized and controversial Duke lacrosse rape case. For a comprehensive account of the case, see STUART TAYLOR, JR. & KC JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2007). For a discussion of the prosecutor and the media in the case, see Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285, 1294–98 (2011).

47. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5 (Proposed Revisions 2009).

explicitly require a prosecutor to consider the credibility of witnesses and the existence of contradictory evidence before instituting charges.

Aside from considering the scope and quality of the proof in “believing” that probable cause exists, does a prosecutor’s determination of probable cause include an interpretation of a broadly worded criminal statute that may or may not cover certain conduct? In other words, does probable cause include a legal determination, or merely a factual one? Consider the following case:

Assume that a federal prosecutor is deciding whether to bring charges against Defendant for “introducing into interstate commerce a misbranded food with intent to defraud or mislead.”⁴⁸ The facts show that Defendant bought two million bottles of salad dressing from a manufacturer and planned to resell the bottles to consumers through discount outlets such as “dollar stores.” The label on each bottle originally contained a notation “best when purchased by,” followed by a date. Before reselling the bottles, the defendant pasted a new label on the bottle over the part containing the “best when purchased by” date by adding a new date marked six months later. The prosecutor, in deciding to charge Defendant with fraud, has characterized the change as the date when “the dressing would expire.” Although the statute defines misbranded food, there is nothing about dates on labels. No regulation of the Food and Drug Administration defines “best when purchased by” or forbids a wholesaler or retailer to change the date.⁴⁹

Is there a basis for the prosecutor to believe that there is probable cause that the defendant violated the above statute? Assume there is no evidence, as the prosecutor should realize, that selling the salad dressing after the “best when purchased by” date endangers health or affects the taste, or that any consumer has complained. Moreover, the prosecutor, in filing the charge, needs to assume that changing the dates on labels constitutes “misbranding” and is conduct intended to “defraud and mislead.” To be sure, among the discretionary factors that would affect the prosecutor’s decision to charge are the harm caused by the offense, the impact of prosecution on the public welfare, and whether the prosecutor has a reasonable doubt that the defendant is guilty. Given the fact that charging abuses can occur from a prosecutor’s overly broad interpretation of an ambiguous statute,⁵⁰ it might be appropriate for the proposed Standards to clarify that the probable cause standard applies not only to a prosecutor’s belief in the evidentiary basis for the charge,

48. *United States v. Farinella*, 558 F.3d 695, 697 (7th Cir. 2009) (citing 21 U.S.C. §§ 333(a), 333(a)(2) (2006)).

49. This example is adapted from *United States v. Farinella*, 558 F.3d 695.

50. See *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010) (holding that 18 U.S.C. § 1346, the so-called “honest services” statute, covers only bribery and kickback schemes and does not authorize prosecutors to charge public or private officials with undisclosed self-dealing).

but also to a prosecutor's belief that the statute reasonably covers the charged offense.⁵¹

B. DIFFERING STANDARDS FOR INITIAL CHARGE, RETENTION OF CHARGE, AND DISPOSITION

Under current Standard 3-3.9(a), a prosecutor is forbidden, after instituting criminal charges, to "permit the continued pendency" of those charges "when the prosecutor *knows* that the charges are not supported by probable cause," and "in the absence of sufficient admissible evidence to support a conviction."⁵² Under proposed Standard 3-5.5(a), as noted above, a prosecutor is authorized to file criminal charges "only if the prosecutor believes the charges are supported by probable cause and reasonably believes that there will be admissible evidence to support the charges beyond a reasonable doubt by the time of disposition."⁵³ Moreover, under proposed Standard 3-5.5(b), the prosecutor is authorized to "maintain criminal charges only if the prosecutor reasonably believes that probable cause continues to exist and that the prosecution has or will obtain admissible evidence to support the charges beyond a reasonable doubt by the time of disposition."⁵⁴ As in the current Standard, the proposed Standard continues to draw a distinction with respect to the prosecutor's state of mind between filing criminal charges and maintaining those charges, namely, that a prosecutor may file charges only if he actually believes that probable cause exists, but may maintain the charges only if there is an objective, reasonable basis for him to believe that probable cause continues to exist.

Imposing one standard for a prosecutor's mental state in the initial filing of charges and another for the continued retention of charges raises several questions. First, it would appear to be illogical to authorize a prosecutor to file a charge if the prosecutor subjectively believes there is probable cause, but to forbid a prosecutor to maintain the charge when he lacks a reasonable belief in the existence of probable cause. Moreover, as a matter of professional ethics, there should be no distinction in terms of the prosecutor's belief in the existence of probable cause when deciding to file the charge and when deciding to maintain the charge. There does not appear to be any good reason why the standard for charging should be more forgiving and less rigorous than the standard for maintaining the charge. In fact, there may be cogent reasons for

51. The same might be said of a potential charge that may be time-barred or a charge based on evidence that may be subject to exclusion for unlawful police conduct.

52. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed. 1993) (emphasis added).

53. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(a) (Proposed Revisions 2009).

54. *Id.* § 3-5.5(b).

imposing an even more rigorous standard for the initial charging decision than for the decision to continue the charge.

Unquestionably, the mere filing of a charge can have devastating consequences on a person's life, liberty, and reputation. As noted above, the subjective probable cause standard is so minimal that it offers very little protection from careless and reckless charging, to say nothing of a prosecutor's deliberate and bad faith charging. Indeed, in the rape case above, the damage to the defendants' lives from the prosecutor's charge was enormous.⁵⁵ Moreover, there are sound reasons for a prosecutor to be more careful in making the initial charging decision than in the charge-retention decision. As in the rape hypothetical, there were many cues that should have alerted the prosecutor to the deficiencies of the complainant's story and the reliability of her identifications. Before any charges are formally instituted, a prosecutor has much greater latitude to investigate the case and to scrutinize the credibility of evidence, as well as the motives of victims and witnesses. Once formal charges are brought, however, and the die is cast, so to speak, it may be much more difficult for a prosecutor to scrutinize the evidence as she would have done earlier. Indeed, once charges are brought, a prosecutor's mindset may take on a tunnel-vision quality, focusing only on the evidence of guilt and disregarding evidence that is inconsistent with guilt. Equally important, once the victim knows that a charge has been filed based on her complaint, it may be much more difficult for the victim to recant or acknowledge a mistake. This may especially be the case when the victim has made an earlier identification.⁵⁶ The ability of a prosecutor to scrutinize the accuracy of that identification would seem to be greater before a charge is filed than after. Further, once charges are filed, and the case is in the public arena, there are many systemic protections available for an accused to correct a mistaken charge, which are unavailable prior to charges being filed.⁵⁷ Finally, the prosecutor is always protected from a false or mistaken charge by the availability of plea deals, even in cases where the prosecutor does not reasonably believe that probable cause exists.⁵⁸

55. Taslitz, *supra* note 46, at 1294–96.

56. See *United States v. Wade*, 388 U.S. 218, 229 (1967) (“Moreover, [i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on” (alteration in original) (quoting Glanville Williams & H.A. Hammelmann, *Identification Parades—I*, 1963 CRIM. L. REV. 479, 482) (internal quotation marks omitted)).

57. Such procedural protections include a motion to dismiss the indictment or information, a motion to suppress evidence relating to the charge, and, of course, the right to a trial, either before a judge or a jury.

58. See *People v. Jones*, 375 N.E.2d 41, 44–45 (N.Y. 1978) (holding that a prosecutor's failure to disclose during plea negotiations that complaining witness had died does not invalidate plea); see also *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (holding that a prosecutor was not required to disclose during plea negotiations evidence that could undermine the credibility of government witnesses).

C. CHARGING AND INNOCENCE

Given the increasing concern by courts, commentators, and the public over the prosecution and conviction of innocent persons, the proposed Standards have addressed explicitly in Standard 3-5.5(c) the prosecutor's filing and maintaining criminal charges against potentially innocent persons.⁵⁹ Once again, as in proposed Standards 3-5.5(a) and (b), Standard 3-5.5(c) makes a distinction between a prosecutor's subjective and objective mental states.⁶⁰ Thus, according to this Standard, "A prosecutor should not file or maintain charges if the prosecutor believes the defendant is innocent, no matter what the state of the evidence."⁶¹ The proposition that a prosecutor should not charge someone with a crime whom he believes is innocent may seem so obvious as not to require a special ethical rule.⁶² Nevertheless, such a Standard might be relevant, as in the rape case above, where a prosecutor has legally sufficient evidence to charge and convict, and where it is conceivable that a jury might convict based on that proof, but the prosecutor does not believe the truth of that evidence. This Standard would authorize the prosecutor to dismiss the charge, even though sufficient evidence of guilt exists to persuade a jury to convict.⁶³

The proposed Standard also appears to address more directly an ethical question that has attracted some attention, which was considered in the current Standard but not resolved.⁶⁴ Consider a case in which a prosecutor has filed charges based on probable cause. While the case is pending, the evidence of guilt disappears—as for example, when the government's key witness dies—but the defense is unaware of this occurrence. Under these circumstances, according to proposed Standard 3-5.5(c), "the prosecutor reasonably believes that proof of guilt beyond reasonable doubt is lacking" and under this Standard, "should not take criminal charges to final judgment."⁶⁵ Obviously, a prosecutor would not

59. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(c) (Proposed Revisions 2009).

60. *Id.*

61. *Id.*

62. Proposed Standard 3-5.6(a)(i), as in current Standard 3-3.9(b)(i), states that one of the discretionary factors that a prosecutor may consider in charging is "the prosecutor's reasonable doubt that the accused is in fact guilty." *Id.* § 3-5.6(a)(i); *see also* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b)(i) (3d ed. 1993). A reasonable doubt, needless to say, is different from actually believing a defendant is innocent.

63. Whether it is ethical for a prosecutor to ask a jury to convict when the prosecutor himself harbors a reasonable doubt of the defendant's guilt is a question that the Standards do not address.

64. *See* *People v. Jones*, 375 N.E.2d 41, 42 (N.Y. 1978) (holding that the prosecutor was not required to disclose to defense during plea negotiations that a key witness had died). The commentary to current Standard 3-3.9 states, "This Standard takes no position on this question." STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 cmt. (3d ed. 1993).

65. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(c) (Proposed Revisions 2009). The term "final judgment" typically includes not only a conviction after trial but a conviction by

bring such a case to trial; he lacks sufficient evidence to convict. But assuming the defense requested that the prosecutor accept a plea, would the prosecutor ethically be allowed to enter into such a deal when the deal would lead to a “final judgment” through a guilty plea—even though the prosecutor “reasonably believes that proof of guilt beyond reasonable doubt is lacking”? The proposed Standard appears to preclude a prosecutor from accepting a plea offer leading to a final judgment. But, if a defendant initiates a plea deal and voluntarily admits his guilt, why should the prosecutor be precluded from accepting the plea?

Moreover, as noted above, the proposed Standards are silent as to whether a prosecutor should be required, as a matter of professional ethics, to investigate the case before charging and to consider contradictory and exculpatory evidence in deciding whether to charge. It would seem that the special interest in the proposed Standards in a defendant’s innocence would be well-served by explicitly noting, either in the Standard relating to probable cause for charging or even as “illustrative factors” relevant to a prosecutor’s discretionary decision to decline or dismiss charges,⁶⁶ the requirement that a prosecutor investigate the case before charging, as well as a requirement that a prosecutor consider contradictory and exculpatory evidence.

Also relevant to the question of innocence is a new provision in the proposed Standard 3-5.6(b) requiring an individual prosecutor to disclose to his supervisor any significant doubts about the quality or sufficiency of the evidence in a case “assigned to the prosecutor.”⁶⁷ The current Standard, 3-3.9(c), merely states that a “prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.”⁶⁸ The proposed Standard restates this principle, but goes on to state that the office may continue prosecution anyway.⁶⁹ In doing so, the proposed Standard leaves several questions unresolved. Even though an assistant prosecutor may not be compelled to prosecute a case in which he has significant doubts about the defendant’s guilt, is it permissible for his supervisor to take punitive action against that prosecutor? The Standard does not answer this question. Moreover, what if an individual prosecutor has significant doubts about a case not “assigned to the prosecutor”? There

a guilty plea as well. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (“A plea of guilty is more than a confession which admits that the accused did the various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.”).

66. See discussion *infra* Part II.D.

67. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(b) (Proposed Revisions 2009).

68. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(c) (3d ed. 1993).

69. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(b) (Proposed Revisions 2009).

is no requirement in the Standard that he disclose these doubts to his supervisor, even though nondisclosure may result in a wrongful prosecution against a potentially innocent defendant. It would seem that if a prosecutor reasonably believes that a wrongful prosecution is being pursued by any prosecutor in his office, he has a duty to alert his supervisor.

D. DISCRETIONARY FACTORS IN CHARGING

The current Standard 3-3.9 enumerates as “illustrative” several factors that may properly be considered by a prosecutor in exercising the charging function.⁷⁰ Proposed Standard 3-5.6 adds several other factors to the list.⁷¹ First, the prefatory language in the current Standard states that these factors may properly be considered by a prosecutor in exercising his discretion *to bring charges*.⁷² The proposed Standard states that these factors may properly be considered by a prosecutor in exercising his discretion “*to decline or dismiss charges*.”⁷³ It is unclear why the proposed Standard enumerates these factors as reasons to “decline or dismiss” charges rather than as factors used to decide whether to file charges in the first place. Moreover, the inclusion in the list of several new factors, as noted below, appears to reflect factors that prosecutors routinely consider in deciding whether to charge. However, neither the current nor the proposed Standards attempt to establish any priority or hierarchy with respect to these factors, presumably suggesting that these factors are of equal importance.

The factors identified in the current Standard—all of which are retained in the proposed Standard—are discussed at length in the commentary to the current Standard.⁷⁴ These factors are familiar and unexceptional. Thus, a prosecutor should consider whether he believes the accused is guilty, the extent of the harm caused by the offense, whether the punishment is excessive, any improper motives of the complainant, any reluctance of victim to testify, any cooperation of the accused in the apprehension of others, and the likelihood of prosecution in another jurisdiction.⁷⁵

The proposed Standard adds six new factors⁷⁶ to the list, which may best be examined by considering the following case:

70. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b)(i)–(vii) (3d ed. 1993).

71. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(a)(i)–(xiv) (Proposed Revisions 2009).

72. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (3d ed. 1993).

73. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(a) (Proposed Revisions 2009).

74. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 cmt. (3d ed. 1993).

75. *Id.* § 3-3.9.

76. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(a) (Proposed Revisions 2009).

Joe and Tom are having sex on a picnic table in a public park around 5 p.m. Joe, thirty-five years old, is married with two young children and works for a computer company. Tom, nineteen years old, is a college student. The couple is spotted by two thirteen-year-old boys who tell their mothers. They called the police who arrive at the scene and arrest Joe and Tom. The prosecutor decides to charge Joe with adultery and Tom with public lewdness. The prosecutor, an elected official, has a reputation as a strong social conservative who has made public comments decrying homosexuality, abortion, and teenage sex. The prosecutor believes there is probable cause for the charges, has no reasonable doubt of the guilt of the accused, reasonably believes that given the testimony of witnesses he will have sufficient admissible evidence to convict, and believes that the public conduct in question is extremely harmful to the morals and quality of life in his community.⁷⁷

Several of the newly-added factors listed in the proposed Standards raise questions about whether it is proper to charge adultery in the above case. Consider the application of the following discretionary factors in the proposed Standards:

1. The prosecutor is aware of the existence of extramarital affairs in his community between married men and women. No charge of adultery has ever been brought in such cases, even though guilt could be proved. Does the prosecution of Joe for adultery “undercut the policy that similarly situated persons be treated equally”?⁷⁸
2. Given that Joe has a wife and children and that the two young boys who witnessed the sexual conduct will be made to testify if the case goes to trial, will the prosecution of Joe have adverse “potential collateral impacts on third-parties”?⁷⁹
3. Given that Joe has an apparently intact family, with two young children, a steady job, and no criminal record, are Joe’s “character” and “situation” relevant mitigating considerations?⁸⁰
4. Assuming that there have been only a few prosecutions for adultery in this jurisdiction in the past fifty years, have there also been sufficient “changes in the larger cultural context” in this community and has the statute “fallen into desuetude,” making a charge of adultery inappropriate?⁸¹
5. What impact will such prosecution have on the “public welfare”?⁸²
6. Does this prosecution reflect a “fair and efficient distribution of limited prosecutorial resources”?⁸³

77. This example is adapted from Eamon McNiff, *Woman Charged with Adultery to Challenge New York Law*, ABC News (June 8, 2010), <http://abcnews.go.com/print?id=10857437>.

78. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(a)(vii) (Proposed Revisions 2009).

79. *Id.* § 3-5.6(a)(viii).

80. *Id.* § 3-5.6(a)(x).

81. *Id.* § 3-5.6(a)(xi).

82. *Id.* § 3-5.6(a)(xii).

83. *Id.* § 3-5.6(a)(xiii).

This case reflects the difficulty of imposing meaningful professional standards on a prosecutor's charging discretion. To be sure, factors such as these are clearly relevant to a prosecutor's careful and responsible charging decision; that's what discretion is all about. But these factors are so malleable and subjective that they arguably would lead some prosecutors not to bring charges of adultery, while at the same time justifying the decision to bring the very same charge. What complicates the issue is the fact that this prosecutor holds strong views against homosexuals and promiscuous sex, which the citizens who elected him may well endorse, and his charging decision therefore may be undertaken to further on his own personal and political ambitions. In short, the enumeration of additional discretionary factors makes the list more complete, but not necessarily more meaningful.

E. PERSONAL AND POLITICAL CONSIDERATIONS, AND UNLAWFUL FACTORS IN CHARGING

Current Standard 3-3.9(d) and the proposed Standard 3-5.5(d) state essentially the same principle in slightly different language: a prosecutor, in bringing or maintaining criminal charges, should not consider personal or political advantages or disadvantages, or the possibility of enhancing his record of convictions.⁸⁴ The proposed Standard adds new language that does not appear in the current Standard: "Race or other unlawful factors should never be considered in a decision to charge."⁸⁵ Consider the following case:

Defendant, a state procurement official, is charged with fraudulent misapplication of funds by allegedly steering a large contract to a travel agency whose principal had donated heavily to the governor's reelection campaign. The prosecutor, currently involved in a tough reelection campaign himself, promotes, through a barrage of attack ads, the claim that the charge against the procurement official is evidence of corruption in the state government, which is controlled by the opposite political party. During his tenure, the prosecutor has brought several other corruption cases against government officials of the opposite political party. He has never brought charges against officials of his own party. There is evidence that the travel agency submitted the lowest bid, and there is no evidence of a kickback or any other impropriety in the acceptance of the bid. Moreover, there is no evidence that the defendant knew or cared about the travel agency's contribution to the governor. As one witness recalls, the defendant had stated that the winning bidder should be selected for "political reasons," but this witness had understood the defendant's remark to be referring to the state's interest in fiscal responsibility and the fact that

84. Compare STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(d) (3d ed. 1993), with STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(d) (Proposed Revisions 2009).

85. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(d) (Proposed Revisions 2009).

the travel agency was from the same state. The prosecutor is reelected.⁸⁶

In examining the charging standards, does this case implicate any of the expressed concerns over charging for personal or political reasons? Did the prosecutor actually believe there was probable cause for the charge? Given the defendant's statement about "politics" and the intimation of a close connection between the travel agency and the governor, it would be virtually impossible to show that the prosecutor did not believe that there was probable cause to charge. However, did the prosecutor "consider [his] personal or political advantages" in bringing the charge?⁸⁷ Although according to this Standard, "unlawful factors should never be considered in a decision to charge,"⁸⁸ did the prosecutor consider such factors in deciding to charge, namely, did he target this defendant for prosecution because of her membership in a particular political party? It might be useful to cross-reference this Standard with proposed Standard 3-1.3, noted above, which prohibits prosecutors from engaging in purposeful discrimination or basing conduct on legally-protected activities.⁸⁹

Perhaps the most that professional standards can do is to articulate aspirational goals that probably can never be attained completely.⁹⁰ There is no question that politics and personal advantage often enter into prosecutorial decisionmaking, and it is better at least to set a high standard. This is likely a place where a prosecutor's own personal integrity and good judgment will determine his official conduct, and general standards can provide very little guidance or deterrence.

F. RACE AND COMMUNITY PRESSURE

Current Standard 3-3.9 does not mention the impact of race or community pressure on a prosecutor's charging decision. Current Standard 3-3.9(e) and the proposed Standard 3-5.6(c) refer to the influence of community pressure on a prosecutor by stating that a prosecutor should not be deterred from instituting charges because juries in the jurisdiction have tended to acquit defendants for the particular

86. This hypothetical was taken from *United States v. Thompson*, 484 F.3d 877, 883-84 (7th Cir. 2007) (dismissing a charge after finding that there was no evidence of fraud).

87. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(d) (Proposed Revisions 2009).

88. *Id.*

89. *Id.* § 3-1.3; see also *supra* pp. 1261-62. For cases holding that membership in a political party is a constitutionally protected activity, see *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64-65 (1990), *Branti v. Finkel*, 445 U.S. 507, 517, 520 (1980), and *Elrod v. Burns*, 427 U.S. 347, 350, 357 (1976).

90. Ellen S. Podgor, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159, 1175 (2011).

crime involved.⁹¹ This latter principle would have relevance in a community that typically acquits law enforcement officials accused of using excessive force or that acquits defendants in domestic abuse prosecutions. The proposed Standard does not refer directly to the influence of community pressure on the charging decision but does state that “[r]ace or other unlawful factors should never be considered in the decision to charge.”⁹² Consider the following case:

Owner of a Korean grocery store in largely black neighborhood has been burglarized three times within the past six months. Other Korean merchants have been victimized as well, and they believe, with some justification, that their complaints to the police have not been aggressively investigated. Owner decides during a particular week to hide in the back of his store after closing time. One of these nights, when an intruder forces open the rear door, Owner, without warning, shoots and kills the intruder, who is a sixteen-year-old black youth with a record of burglaries and assaults. The jurisdiction’s penal code provides that the use of deadly force is not justified unless the actor reasonably believes that the other person is attempting to dispossess him of his dwelling or is attempting to commit arson, burglary, robbery, or felonious theft of property, and the use of nondeadly force would expose the actor to the risk of serious bodily harm. Assume there is no evidence that the store is Owner’s dwelling or that the use of nondeadly force would expose him to a risk of serious bodily harm. The prosecutor has the option of charging murder, some degree of manslaughter, or not charging any crime based on the view that Owner was justified in killing the intruder.

This case suggests that prosecutors may be influenced, and legitimately, by considerations of race and community pressure in filing charges. The provision in the proposed Standard 3-5.5(d) that “[r]ace . . . should never be considered in a decision to charge” is too broad. According to the hypothetical problem, the racial tensions in the community, and the perceived failure of law enforcement to adequately protect Korean business owners, motivated Owner to choose self-help and culminated in this killing. The prosecutor almost certainly will consider the racial tensions in the community and how race factors into the killing when making the charging decision, although perhaps only as a mitigating factor rather than as an exonerating factor. It would be difficult in hindsight to criticize as illegitimate the prosecutor’s consideration of how race affects the prosecution of this case. The prosecutor knows he could secure an indictment for murder, and that the

91. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(c) (Proposed Revisions 2009); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 (3d ed. 1993). The Standard does not address the reverse situation—in other words, a case in which a prosecutor decides not to file charges because of his belief that juries would acquit. That seems to raise a more difficult ethical issue and probably should be addressed in the Standards.

92. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(d) (Proposed Revisions 2009).

justification defense likely would not be successful. The prosecutor also reasonably expects that a mostly black jury with few or no Korean members would likely convict Owner of murder, whereas a jury of Asians would probably acquit. Once again, this is not a case for formal professional guidelines; it is a case for policy, judgment, and a prosecutor's personal ethics and integrity.

G. OVERCHARGING

The practice by some prosecutors of "overcharging" has been criticized as an abuse of the charging function. However, it is not completely clear what "overcharging" means, or why the practice is illegitimate.⁹³ Proposed Standard 3-5.6(d) is similar to the current Standard and states that a "prosecutor should not file . . . charges greater in number or degree than can reasonably be supported with evidence at trial and that are necessary to fairly reflect the gravity of the offense or deter similar conduct."⁹⁴ Thus, a prosecutor may properly file charges when reasonably based on the evidence and when the prosecutor believes that such charges are necessary to reflect fairly the seriousness of the conduct and to deter similar conduct. The Standard does not bar a prosecutor from filing such charges, even if the prosecutor believes that such charging provides additional leverage for the prosecutor in plea bargaining. Consider the following case:

Defendant, driving home from work at 6 p.m., passes through a stop sign without stopping and strikes a nine-year-old girl and her mother while they are crossing the street. The girl is killed instantly and her mother is critically injured. The defendant had been drinking, was driving with a suspended license, and tread marks suggest that his speed at the time of impact exceeded the posted speed limit of thirty miles-per-hour by at least ten-to-fifteen miles-per-hour. There are several homicide charges available, including criminally negligent homicide, manslaughter, and murder. The prosecutor is considering whether to include the highest count of murder in deciding to file charges based on the theory that the defendant's conduct evinced a culpable mental state that was recklessly indifferent to human life.

Would a charge of murder be an "overcharge"? Does the evidence "reasonably support" a charge of murder? Does the prosecutor believe that bringing a murder charge "fairly reflects" the seriousness of the offense and may deter future motorists from such conduct?

The prosecutor's exercise of discretion must take into account a range of factors that are enumerated in proposed Standard 3-5.6(a),

93. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 cmt. (3d ed. 1993) ("Discretion in Selecting the Number and Degree of Charges").

94. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(d) (Proposed Revisions 2009).

which a prosecutor may consider in “declining or dismissing” charges.⁹⁵ Current Standard 3-3.9(b) includes many of the same factors that a prosecutor “may properly consider in exercising his or her discretion.”⁹⁶ Examining the relevant factors listed in the Standards once again demonstrates the difficulty of trying to formulate meaningful guidelines that could be successfully applied in individual cases, particularly in those cases where it must be determined whether a prosecutor has engaged in illegitimate charging by filing more or higher charges than necessary. Consider the following questions:

1. Does the prosecutor have a “reasonable doubt that the accused is in fact guilty”?⁹⁷
2. What is “the extent of the harm caused by the offense”?⁹⁸
3. Is there a disproportion in the authorized punishment in relation to the offense and the offender?⁹⁹
4. Does the prosecutor have a “policy” regarding vehicular homicides, and would charging murder undercut the policy “that similarly situated persons be treated equally”?¹⁰⁰
5. What is the relevance to the exercise of the prosecutor’s discretion of “the character of the offender or other aspects of the offender’s situation”?¹⁰¹

Is a murder charge an example of “overcharging”? Arguably, all of the above factors are so broadly worded that they could be used by different prosecutors both to support and to reject a murder charge. A prosecutor could claim that there is no reasonable doubt that the accused is guilty of depraved-mind murder; that the harm is very grave; that the punishment fits the crime; and that there is no general policy that would be undercut by a murder charge. However, the “character of the offender”—a nebulous and uncertain factor—may be the most critical factor of all. Would the prosecutor be more likely to charge murder if the defendant were an illegal immigrant than if the defendant were a judge or a highly decorated veteran of the Iraq war? Does the defendant’s youth, family, or status matter? Once again, the list of factors relevant to the exercise of discretion in making the charging decision does not appear to raise ethical questions as much as it raises questions of practice, policy, and judgment. However, given the opportunity for widely different treatment of persons who have committed the same crime, should such conduct raise ethical questions? If so, then the

95. *Id.* § 3-5.6(a).

96. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (3d ed. 1993).

97. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(a)(i) (Proposed Revisions 2009).

98. *Id.* § 3-5.6(a)(ii).

99. *Id.* § 3-5.6(a)(iii).

100. *Id.* § 3-5.6(a)(vii).

101. *Id.* § 3-5.6(a)(x).

Standard is inadequate. Perhaps it would be better for the Standard to state that even if the charges are reasonably supported by the evidence, the prosecutor should not bring them when it reasonably appears that they are being brought to gain a tactical advantage, either to induce a plea, or to coerce a witness into cooperating with the government.

H. RELEASE-DISMISSAL CASES

Both the current Standard 3-3.9(g) and the proposed Standard 3-5.6(e) address the question of whether and under what circumstances it is proper for a prosecutor to condition the dismissal of criminal charges on the defendant's promise to relinquish his right to bring a civil action against the arresting police officers or other government officials for violating his civil rights.¹⁰² There is obviously an element of coercion in requiring as a condition of dismissal a promise not to sue, and it may reasonably be claimed that such a promise contravenes public policy. However, the Supreme Court has upheld such agreements and held them not to be *per se* void as against public policy.¹⁰³ The current Standard and the proposed Standard both attempt to clarify the question of when a prosecutor may dismiss a charge if the defendant promises to release the government from civil liability. The first sentence of the proposed Standard essentially reiterates the current Standard but changes the language to state that "a prosecutor may condition a dismissal . . . only if the accused has agreed [not to sue],"¹⁰⁴ whereas the current Standard states that a prosecutor "should not condition a dismissal . . . unless the accused has agreed [not to sue]."¹⁰⁵ However, the added sentence in the proposed Standard—"[a] prosecutor should not use a civil waiver to avoid a bone [sic] fide claim of improper law enforcement"¹⁰⁶—appears to contradict the first sentence or at least to confuse the matter. Consider the following case:

Defendant has been arrested by a Transit Authority Officer for disorderly conduct and resisting arrest for engaging in loud and profane conduct on a subway platform and for resisting arrest when the Officer approached him and tried to get him to desist. Defendant appears at his arraignment with a large welt under his eye, and in response to the judge's question, the Officer states that the injury occurred when Defendant fell and hit his face on a subway bench. Defendant's lawyer advises the arraignment prosecutor that the Officer

102. *See id.* § 3-5.6(e); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(g) (3d ed. 1993).

103. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

104. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(e) (Proposed Revisions 2009).

105. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(g) (3d ed. 1993).

106. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(e) (Proposed Revisions 2009).

and his partner had beaten Defendant at the booking location, and when the skeptical prosecutor confronts the Officer, the latter responds: "It happened the way I said it did, counsel." Assume Defendant, through his lawyer, seeks a dismissal of charges contingent upon Defendant's agreement not to bring a civil action against the officers or the city.

Assume the prosecutor believes that Defendant has a "bona fide claim of improper law enforcement." What should an ethical prosecutor do? Does the Standard tell us? On the one hand, under both the current Standard 3-3.9(g) and the proposed Standard 3-5.6(e), "the accused has agreed to the action knowingly, intelligently and voluntarily, and such waiver is disclosed to the court."¹⁰⁷ The prosecutor, therefore, may accept the waiver. On the other hand, new language in Standard 3-5.6(e) states that the prosecutor "should not use a civil waiver to avoid a bone [sic] fide claim of improper law enforcement," and that the decision not to file criminal charges against the defendant "should be made on the merits and not for the purpose of obtaining a civil waiver."¹⁰⁸ The prosecutor faces a dilemma produced by a confusing Standard. The prosecutor could decide that there is no merit to the criminal charges, and that, therefore, he would be justified in accepting the waiver. But if the prosecutor is either uncertain about the validity of the criminal charges or is skeptical of the officer's story, is the prosecutor's decision to accept a waiver and dismiss the charges made legitimately "on its merits," or is it made illegitimately "for the purpose of obtaining a civil waiver"? Under the proposed Standard, we cannot know.

It seems that the intent of the proposed Standard is to allow a defendant to initiate a dismissal of charges by agreeing not to sue if the charges are dismissed. The prosecutor could then decide to agree to the defendant's request if he believes the dismissal and waiver are in the public interest. The Standard appears to be intended to bar the prosecutor from initiating such a discussion because of its inherently coercive nature. If that is the Standard's intent, it should state that position explicitly. As presently written, the proposed Standard is unclear.

CONCLUSION

The proposed Standards dealing with the prosecutor's charging function and the exercise of charging discretion have made several additions to the current Standards. To bring charges, a prosecutor must "believe" rather than "know" that the charges are supported by probable cause and must have a "reasonable belief" in their continued validity to

107. *Id.*; see also STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(g) (3d ed. 1993).

108. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6(e) (Proposed Revisions 2009).

retain those charges for disposition. The proposed Standards, for the first time, acknowledge the impact on the charging function of potential innocence and the responsibility of a prosecutor when he believes that he may be prosecuting an innocent person. The proposed Standards also add several new factors to the list of factors relevant to a prosecutor's exercise of discretion.

However, as I have tried to demonstrate with my hypothetical cases, the charging function is so complex, and the discretionary process so fact specific, that it easily eludes standardized decisionmaking. Requiring a prosecutor to believe that a charge is based on probable cause will support almost any charging decision; listing without any attempt at prioritization numerous discretionary factors will support virtually any charging decision not shown to have been made in bad faith, no matter how egregious it appears. To be sure, the proposed Standards, as well as the current Standards, are a perfectly legitimate attempt to establish aspirational rules. Insofar as they may purport to provide meaningful guidelines for prosecutors engaged in making charging decisions, the Standards do not appear to be relevant or helpful.